Supreme Court, U.S.
FILED
APR 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-203

No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1986.

THEODORE E. HARVEY,
PETITIONER,

v.

RICHARD A. SUBATCH,
RESPONDENT.

ON A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

SUPPLEMENTAL APPENDIX.

JOHN J. JENNINGS,*
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Table of Contents.

Defendant-Appellant's Motion Respectfully Requesting Action on His Previously Filed Petition for Rehearing 1a

Order of the United States Court of Appeals for the First Circuit dated July 13, 1987 4a

UNITED STATES COURT OF APPEALS

FOR THE

FIRST CIRCUIT

No. 86-1022

RICHARD SUBATCH,)
Plaintiff-Appellee)
vs.)
THEODORE E. HARVEY,)
Defendant-Appellant)

Defendant-Appellant's Motion Respectfully Requesting
Action on his Previously Filed Petition for Rehearing

Subsequent to this Court's opinion entered in this matter on December 23, 1986, the Defendant-Appellant filed a combined petition under Fed. R. App. P. Rules 35 and 40 (copies submitted herewith). In the first paragraph of said petition, the Defendant-Appellant petitioned "for rehearing," and in the second paragraph, "suggest[ed] that this matter is appropriate to be heard in banc. . . ."

On January 27, 1987, this Court entered an order: "Appellant's petition for rehearing in banc is denied."

On April 27, 1987, within ninety (90) days of the said order, the Appellant filed a Petition for Writ of Certiorari with the Supreme Court of the United States.

By letter of Francis J. Lorson, Chief Deputy Clerk, Supreme Court of the United States, dated May 11, 1987 (attached hereto), the defendant was informed that his Petition for Writ of Certiorari was out-of-time because a petition for rehearing in banc does not stay the time for filing, whereas a petition for rehearing does.

Only the single order of this Court denying the in banc request was issued by this Court. This order was reproduced by the Appellant in the Appendix to the Petition for Writ of Certiorari, hence Chief Deputy Clerk Lorson's response. Appellant's counsel apparently misapprehended this Court's order denying the in banc request as subsuming a denial of the request for rehearing.

The failure of this Court to respond to the Appellant's request for rehearing may have been due to the style of the cover of the petition as "Petition for Rehearing in Banc." For this misstatement in form, counsel humbly apologize.

In telephone conversation with Chief Deputy Clerk Lorson on May 13, 1987, undersigned counsel, Charles M. Burnim, explained that the petition filed with this Court was a dual petition, that unfortunately the Petition for Writ of Certiorari may not have accurately so reflected, and that counsel had assumed that the denial of the rehearing in banc subsumed (apparently erroneously) the denial of the request for rehearing. Chief Deputy Clerk Lorson informed undersigned counsel that if that were so, the Petition for Writ of Certiorari would be timely, and suggested that counsel clear the matter with the Court.

Accordingly, Appellant respectfully requests this Court respond to his request for rehearing. Further, if this Court were to decide to deny the petition for rehearing, counsel respectfully suggest (as suggested by Chief Deputy Clerk Lorson) that this Court do so *nunc pro tunc*, so that the Appellant's Petition for Writ of Certiorari may be docketed forthwith, and with minimal further printing expense. [It is believed that an order of denial, currently dated, would render the Petition for Writ of Certiorari premature, marking the commencement of the ninety (90) day period for filing.]

Again, counsel apologize for any confusion or inconvenience that the style of the Appellant's petition may have caused to this Court, or to the office of clerk of this Court.

Respectfully submitted,

By his attorneys,

/s/_____
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Frawley & Jennings,
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(617) 595-3333

/s/_____
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CERTIFICATE OF SERVICE

I, Charles M. Burnim, hereby certify that I have served a copy of the above upon counsel for the Plaintiff-Appellee, Daniel Chaffee, Esq. and George Jabour, Esq., Denner & Benjoya, 110 Union Wharf, Boston, MA 02109, by mailing the same postage prepaid this May 16, 1987.

/s/_____
Charles M. Burnim, Esq.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86-1022

RICHARD A. SUBATCH,
Plaintiff, Appellee,

v.

THEODORE E. HARVEY,
Defendant, Appellant.

Before

Coffin, Bownes and Torruella,
Circuit Judges.

ORDER OF COURT

Entered July 13, 1987

With regard to appellant's motion requesting a determination of his petition for rehearing under Fed. R. App. P. 40, that petition for rehearing is denied, *nunc pro tunc*, as of January 27, 1987, the date of this court's denial of appellant's petition for rehearing in banc.

Mandate is constructively recalled and reissued.

By the Court,

FRANCIS P. SCIGLIANO
CLERK.